Ramaprasada Rao, J.

C.R. Parthasarathy *v.* The Accommodation Controller, Madras-2.

3rd September, 1973.

W.P. No. 2899 of 1971.

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 29—*Application by landlord for release of premises—Landlord possessing other houses—Landlord choosing the particular premises for own occupation—Government's refusal to release on the ground that landlord can choose any one of his other houses—Validity.*

In an application by the landlord under Act (XVIII of 1960) for the release of his premises, the Government refused and added that the landlord had ten other houses, he might as well choose one amongst them and his choice of the present house was not *bona fides*. The landlord challenged the validity of the order.

Held: As the law was clear that it was the landlord or landlady who had the voice and the choice to make in the matter of choosing one of his or her many houses, the Government had no part to play in that field of activity which was exclusively that of the landlord.

N. S. Raghavan, for the Petitioner.

S. Ramalingam, Assistant Government Pleader for Respondents 1 and 2.

S.J. *Petition allowed.*

Kailasam, J.

The Chidambaram, Labhai Street Mosque *v.* Dr. S. Chakravarthi.

6th September, 1973.

C.R.P. No. 1831 of 1972.

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 10, *General Clauses Act (X of* 1897), *section* 27—*Petition for eviction—Termination of tenancy—Notice sent by registered post—Returned with postal endorsements—Service of notice—Whether valid—Presumption.*

The burden of disproving the service of notice, which is relied upon by the landlord in view of the presumption under section 27 of the General Clauses Act, is on the tenant. Under section 114 of the Evidence Act, it is entirely within the discretion of the Court to accept the postal endorsements. It is open to the tenant to examine the postman, prove the endorsements made by him and establish that the notice was not served. The question whether the tenant has disproved the service of notice on him is one of fact.

The words "unless the contrary is proved" used in section 27 of the General Clauses Act, indicate that the tenant is at liberty to prove that the service was not effected at the time at which it would be delivered in the ordinary course of post.

C. L. Vijayaraghavan, for Petitioner.

B. Lakshminarayana Reddy, for Respondent.

S.J. *Finding called for.*

Ismail, and
Natarajan, JJ.

C.P. Venkatarama Iyer *v.* M/s. Kasi and Sethu.

24th September, 1973.
Appeal No. 341 of 1973.

Tamil Nadu Agriculturists Relief Act (IV of 1938), *section* 10 (2) (*ii*), 8—*Suit on a promissory note—Sale of house property—Vendee executing pronote for balance of consideration—Rate of interest—Vendee claiming to be agriculturist—Whether entitled to the benefits of the Madras Act IV of* 1938.

V, the purchaser of a house property on 9th July, 1971 executed a promissory note to the vendor for the balance of consideration. The vendor filed a suit for the recovery of the money. *V* claimed that he was entitled to the benefits of Madras Act(IV of1938) and that he would pay interest only at the rate of 6¼ per cent. On the question whether he would be entitled to the benefits as claimed by him,

Held: *V* was not entitled to any relief by way of reduction of the rate of interest in view of the fact that the operation of section o which alone applied to the debt in question as having been incurred prior to 1st March, 1972 had been excluded from the operation of section 10 (2) (*ii*) of the Act even after its amendment by Tamil Nadu Act (VIII of 1973).

G. Jagadeesa Iyer, for Appellant.

S. Srinivasan, for Respondent.

S.J. *Appeal dismissed.*

Somasundaram, J.

Thiagarajan *v.* P. Ganesan.

22nd October, 1973.
Cr.R.C. No. 878 of 1973.
Cr.R.P. No. 867 of 1973.

Tamil Nadu Hindu Religious and Charitable Endowments Act (XIX of 1951), *section* 101—*Appointment of Trustees—Temple—Application by Trustees for taking delivery of temple—Certificate under section* 101 *whether necessary.*

Certificate under section 101 of the Hindu Religious and Charitable Endowments Act is not necessary for effecting delivery of the temple and its records.

Subramania Gounder v. *Kandaswami,* (1964) 2 M.L.J. 298, followed.

Thiagarajan, for Appellant.

V. Venkataraman for Respondent.

S.J. *Cr.R.C. dismissed.*

N. S. Ramaswami, J.

V. Sankara Ayyar *v.* Sandana Muthiriar.

13th November, 1973.
C.R.P. No. 1372 of1973.

Tamil Nadu Cultivating Tenants Arrears of Rent (Relief) Act (XXI of 19/2), *section* 3 (1) (*c*)—*Annual rent—Deposit by tenant—Correct value assessed as more by lower appellate Court—Difference not deposited within time provided by Act—Extension of time granted by Court—Whether valid—Court has no jurisdiction.*

Under section 3 (1) (*c*) of Act (XXI of 1972), not only, the original deposit but also the difference in the value as found by the Court has to be deposited by the tenant within the time allowed. 11th February, 1973 was the last date by which, in the instant case, the tenant should have made the deposit. The Court below extended the time and the tenant made the deposit only in May, 1973. On the validity of this extension of time,

Held: Following the view of the learned Judge in C.R.P. No. 1371 of 1973 (*Kasturi Ammal* v. *Perumal Naicker*) that the provisions of the Act would not enable a Court to grant further time to the tenant to pay the arrears beyond the stipulated date, the Civil Revision Petition was allowed.

R. Alagar, for Petitioner.

V. S. Ramakrishnan, for Respondent.

S.J. *Petition allowed.*

Kailasam and
N. S. Ramaswami, JJ.

V. S. Palanikumar v. The Revenue Divisional Officer, Tirunelveli District.

3rd September, 1973.
W.A. No. 518 of 1969.

Madras Proprietary Estates Village Service and the Madras Hereditary Village Offices (Repeal) Act (XX of 1968), *section* 2 (2)(ii)—*Appointment of Karnam—Temporary basis—Writ Petition against appointment—Pending petition, Act XX of* 1968 *coming into force—Effect—Abatement of pending proceedings.*

On 18th August, 1968, *P* was appointed karnam on a temporary basis by the Revenue Divisional Officer. Within a month thereafter *K* filed a writ challenging the appointment and a rule *nisi* was issued. Act XX of 1968, came into force on 1st December, 1968. On the question of abatement of pending proceedings consequent to section 2 (2) of Act XX of 1968 and whether the writ petition would be maintainable,

Held,

Applying the principle that the moment a rule *nisi* was issued calling upon the authority to send for the use of the Court all the records with all things touching the same as fully and perfectly as they had been made by the authority, the decision in the appeal was again set at large, as it lost its finality the moment the Court issued the rule *nisi* (as laid down in *Satyanarayana* v. *Venkatamma*, (1951) 2 M.L.J. 477). As in this case rule *nisi* had been issued, the proceedings by way of an application before the Revenue Divisional Officer should be deemed to have been pending. When this conclusion is reached, section 2 (2) (*ii*) of Act XX of 1968 will come into operation and the application which is pending shall abate. The proceedings before the Revenue Divisional Officer, which is the subject-matter of the writ petition will also abate. This will result in the entire matter being left open for the authorities to make a fresh and final appointment. The authorities are at liberty to take steps to notify the vacancy and to fill it up on a permanent basis.

The jurisdiction of the Court under Article 226 of the Constitution, to correct apparent errors, had not been and could not be taken away by the enactment. The writ petition is properly effective and can be decided by the Court.

K. Parasaran, for Appellant.

D. Raju, for 1st Respondent.

V. K. Kumaraswamy, for 2nd Respondent.

S.J. *Appeal allowed.*

Natarajan, J.

V. A. Narayana Raja v. O.RM.M.SV.M. Meyyappa Chettiar (died).

19th October, 1973.
A.A.O. No. 307 of 1971.

Civil Procedure Code (V of 1908), *Order* 21, *rule* 90, *Order* 43, *rule* 1 (*jj*)—*Mortgage decree—Sale by Court auction—Mortgagor adjudicated insolvent—Application by insolvent to set aside sale—Maintainability—Applicant not present in Court—Whether Court can dismiss application—Dismissal order for default—Appealable.*

Though an insolvent does not have a present right of management over his properties till he is discharged from his insolvency or till the insolvency is annulled it can never be denied that the insolvent is entitled to any surplus proceeds or properties left unsold after the claims of his debtors are satisfied. As such an insolvent certainly has a right to agitate before the executing Court that his properties had not been sold for a just and proper price, even though he does not have a right *in presenti* over his properties and his right to claim the surplus proceeds is a latent right, which can be enforced only after all the claims of the debtors are satisfied.

A reading of rule 1 (*jj*) of Order 43, Civil Procedure Code clearly shows that what is required for an appeal being preferred against a rejection of an application under sub-rule (1) of rule 105 of

Order 21 of the Code is that the order on the main application referred to in sub-rule (1) of rule 104 of Order 21, is an appealable order. Undoubtedly an order of dismissal of an application under Order 21, rule 90 of the Code is an appealable order under Order 43, rule 1 (*jj*). Nowhere it is stated in Order 43, rule 1 (*jj*) that where an application under rule 105 had been dismissed for default, it was not open to the aggrieved party to file an appeal.

M. Srinivasan, for Appellant.

N. C. Raghavachari, for Respondents 1 and 2.

S. Narayana Iyengar, for Respondent 5.

N. S. Varadachari, for Respondent 6.

S.J. *Appeal allowed.*

Kailasam and
N. S. Ramaswami, JJ.

Murugan *v.* Jayarama Pillai

6th September, 1973.

L.P.A. No. 30 of 1969.

Transfer of Property Act (IV of 1882), *section* 58 (*c*)—*Mortgage by conditional sale or outright sale—Relevant factors*—" கெடு கிரயம்"—"வாய்தா கிரயம்"—*Meaning—Reference to time limit and not to condition of re-purchase—Words and phrases.*

The term "கெடு கிரயம்" means a sale which is to take effect after a particular time limit. If it is an outright sale, the document would be termed as "சுத்த கிரயம்." The term "வாய்தா கிரயம்" is more or less equivalent to "கெடு கிரயம்" and cannot possibly refer to the condition to repurchase.

Held on facts: The document is styled as " கெடு கிரயம் ".

The most important circumstance is that the consideration is an odd sum. If it is an outright sale, the parties need not have agreed upon such an odd figure as consideration for the same. The entire sum paid by the defendant under the document went towards the discharge of loans due by the plaintiff. There is also some evidence to show that the property was worth much more than the sum mentioned in the document as on the date of the document. Yet another circumstance is that when the plaintiff gave notice calling upon the defendant to accept the sum mentioned in the document and hand over possession of the property to him, the defendant after receiving the notice did not protest and also did not send any reply. The document is only a mortgage by conditional sale.

M. A. Srinivasan and *M. A. Srinivasan,* for Appellant.

R. Gopalaswamy Ayyangar, for Respondent.

V.S. ——— *Appeal dismissed.*

Ismail and
Natarajan, JJ.

The Commissioner of H.R. & C.E. Madras *v.* Vaithinatha Gurukkal.

6th September, 1973.

Appeal No. 478 of 1967 and Memorandum of Cross-objections.

(A) *Trusteeship—Small temples—Archakas may also be trustees—Madras Hindu Religious and Charitable Endowments Act (XXII of* 1959).

There is nothing illegal or improper in Archakas being trustees of small temples.

(B) *Madras Hindu Religious and Charitable Endowments Act (XXII of* 1959), *section* 63 (b)—*Deputy Commissioner—Trusteeship of a temple—Whether hereditary or not—Empowered to decide—Hereditary trusteeship—Admission—Whether a particular person is entitled to function as a hereditary trustee at a particular point of time—No jurisdiction in Deputy Commissioner to decide.*

Under section 57 (*b*) of the Hindu Religious and Charitable Endowments Act of 1951 or 63 (*b*) of the Act of 1959, the Deputy Commissioner is empowered to decide whether the trusteeship in relation to a religious institution was hereditary or not and not to decide whether a particular person was entitled to function as a hereditary trustee at a particular point of time, with reference to a temple the hereditary nature of the trusteeship of which had been admitted.

(C) Res judicata—*Principles in section* 11 *of Civil Procedure Code—Applicable to other proceedings.*

The principles of *res judicata* in relation to suits enunciated in section 11 of the Civil Procedure Code are not exhaustive. The general principles of *res judicata* would, however, apply to other proceedings even though section 11 of the Code of Civil Procedure would not in terms in apply.

(D) Res judicata—*Applicability on general principles – To be directly and substantially in issue in former proceedings—Madras Hindu Religious and Charitable Endowments Act (XXII of* 1959), *section* 63 (b)—*Temple—Deputy Commissioner — Trusteeship—Whether hereditary or not—Not in dispute in prior proceedings—Determination of question in subsequent proceedings—No bar of* res judicata.

For the purpose of the application of the general principles of *res judicata* a particular matter should have been directly and substantially in issue in former proceedings so as to bar the reconsideration of the same matter in subsequent proceedings.

If the question whether the trusteeship was hereditary or not was not in issue between the parties in proceedings under the Act, the Deputy Commissioner would have no jurisdiction whatever to decide that question. Therefore if the Deputy Commissioner rendered a finding on that question which was not in controversy or dispute before him, his finding cannot be said to be final or conclusive so as to bar the agitation of the same question in a properly framed proceeding instituted subsequently.

The Additional Government Pleader, for Appellants.

V. Balasubramaniam and *J. Jaya Raman*, for 1st and 2nd Respondents.

V.S. ——— *Appeal dismissed.*

Venkataraman and Maharajan, JJ.

Gouse Bi *v.* Salima Bi.

7th September, 1973.

C.M.P. No. 8236 of 1973, in C.M.P. No. 719 of 1972, in Appeal S.R. No. 81649 of 1970.

Civil Procedure Code (V of 1908), *Order* 41, *rules* 1 *and* 5, *section* 151 *and Limitation Act (XXXVI of* 1963), *section* 5—*Appeal—Application to excuse the delay in filing appeal—Application for interim stay pending application for excusing the delay—Jurisdiction to grant* ex parte *order of stay.*

Under Order 41, rule 5 and section 151 of the Civil Procedure Code, the High Court has jurisdiction to grant an *ex parte* order of stay pending an application filed for excusing the delay in filing the appeal.

The moment a memorandum of appeal has been presented, though out of time, there is an appeal under the provisions of Order 41, rule 1.

In granting an *ex parte* order of stay under section 151 in such circumstances, the Court is in no way dealing with the appeal itself and the provisions of Order 41, rule 1 (3), Civil Procedure Code, are in no way contravened.

K. Hariharan, for *P. S. Chinnappan*, for Petitioner.

V.S. ——— *Ordered accordingly.*

Maharajan, J.

Ramaswami Goundar S/o. Appachi Gounder *v.* Ramaswami Gounder S/o. Sankara Gounder.

14th September, 1973.

A.A.O. No. 271 of 1971.

Transfer of Property Act (IV of 1882), *section* 91 *and Civil Procedure Code (V of* 1908), *Order* 34, *rule* 1—*Suit by mortgagee for sale—Purchaser of part of hypotheca—Not impleaded in suit—Entire property sold and purchased by stranger in Court sale—Suit by purchaser of part of the hypotheca for redemption—Redemption of part of hypotheca to be allowed—Avoidance of multiplicity of suits.*

The subsequent purchaser of the equity of redemption in a part of the hypotheca and who had not been impleaded as a party to the mortgage action filed by the mortgagee, is, after the mortgage decree has resulted in a Court sale in favour of a third party entitled to redeem only part of the hypotheca purchased by him.

Though the mortgage decree and sale held in execution thereof would be clearly binding upon the parties thereto including the primary mortgagors, it would not bind the subsequent purchasers of a portion of the hypotheca and who were not impleaded in the mortgagee's suit. Their right of redemption would remain intact notwithstanding the fact that the mortgagor's right to redeem had been extinguished by the sale under the hammer of Court.

The rule of contribution would be applicable as between the share purchased from the mortgagors by the purchasers of part of the hypotheca and the purchaser of the entire property at the Court auction. In order to prevent multiplicity of suits the purchasers of part of the hypotheca should be allowed to redeem only that portion of the property which they have purchased on payment of the proportionate amount of the mortgage money.

M. S. Venkatarama Iyer, V. C. Palaniswamy and *Chenniappen*, for Appellants.

A. R. Ramanathan, P. Vedavalli and *Mrs. Bhagirathi Narayanan*, for Respondents.

V.S. ——— *Appeal dismissed.*

Ramanujam, J.

B. Tiruvalloor Pillai v. Seshadri Iyer.

23rd October, 1973.

S.A. No. 1765 of 1971.

Civil Procedure Code (V of 1908), *section* 80 *—Notice of suit by a person—Person claiming under him—Whether can file suit without fresh notice—Principles.*

The plaintiff's mother issued a notice under section 80 of the Civil Procedure Code. On her death, the plaintiff had no interest in the suit property as he had assigned all his rights accruing to him on the death of his mother, in the suit property, in favour of his wife. It cannot be said that the plaintiff has filed the suit as a person claiming interest in the suit property under his mother. The plaintiff having no subsisting interest in the property which is the subject-matter of the suit cannot rely on the notice issued by his mother nor can he maintain the suit in his own right. In this view the plaintiff's suit should be held to be incompetent.

R. Thiagarajan and D. Peter Francis, for Appellant.

T. K. Subba Rao, R. Srinivasan and K. V. Rajan, for 1st Respondent.

The Additional Government Pleader, for 2nd Respondent.

V.S. ——— *Appeal dismissed.*

Gokulakrishnan, J.

S. Mohamed Ismail v. M. S. Mohamed Essa.

20th December, 1973.

S.A.No. 1164 of 1971.

Specific Relief Act (XLVII of 1963), *section* 38, *—Civil Procedure Code (V of* 1908), *Order* 41, *rule* 3*—Trade and Merchandise Marks Act (XLIII of* 1958), *section* 105-*e—Suit for permanent injunction—Partnership—One partner retiring—Prohibition not to carry on business within city limits—Business started in another name—Whether within prohibition—Injunction granted by lower Court—Validity—Whether violation of Trade and Merchandise Marks Act.*

Two Brothers, *I* and *E*, were carrying on business as a partnership within the city of Madras in the name and style of M. M. Mohamed Saleh. *E* retired from the firm. Under clause (8) of the partnership deed the outgoing partner, would not be entitled to any goodwill and should not open a similar business in the name of the previous partnership. *E* left the city and carried on business in Madurai. Subsequently he returned to Madras and opened a business in partnership under the name and style of "Saleh Machinery Stores" in the same street. *I* and his firm filed a suit against *E* and his partners for a permanent injunction *E* was the first defendant; 'Saleh Machinery Stores' was the second defendant. The third defendant was the wife of *E* and the fourth defendant was the brother-in-law of *E*. The third and fourth defendants were alleged to be namelenders. The trial court granted a decree as prayed for on the findings that the business actually belonged to *E* and the 3rd and 4th defendants were only benamidars for *E* and the business of "Saleh Machinery Stores" traded in goods similar to those of the plaintiff. Aggrieved by the decision the 2nd, 3rd and 4th defendants filed an appeal and the appeal was allowed on the finding that the business of 'Saleh Machinery Stores" belonged only to *E* and not to the 3rd and 4th defendants, and that on the contention of the 2nd, 3rd and 4th defendants raised under section 105 (*e*) of the Trade and Merchandise Act, 1958, there was no attempt by them to pass off the goods as those of the plaintiffs. The plaintiff filed a second appeal Held, that the decision of the trial Court was only with reference to clause (8) of the the partnership deed between *I* and *E*. As such, even though the appellants before the lower appellate Court averred that 'Saleh Machinery Stores' was not similar to the firm of 'M.M. Mohamed Saleh', the same cannot be common ground for the first defendant (*E*) also, inasmuch as the first defendant (*E*) alone was bound by clause (8) of the partnership deed between *I* and *E*. Hence Order 41, Rule 4, Civil Procedure Code could not be relied on to support the decision of the lower appellate Court. In view of the finding of the lower appellate Court that defenedant 2 to 4 were only benamidars, a decree against defendants 2 to 4 can stand independently and there cannot be any incon-

sistency, contradictoriness or unworkability if the order was passed against defendants 2 to 4. Taking into consideration the evidence on record, the concurrent findings arrived at by the courts below to the effect that defendants 3 and 4 were benamidars, cannot be interfered with. The suit would not fall under section 105 (*e*) of the Trade and Merchandise Act, 1958. The suit was decreed as prayed for.

T. R. Ramachandran, for Appellants.

Venkatachalapathy, for 1st Respondent.

Balathandapani, for 3rd and 4th Respondents.

S.J. ——— *Appeal allowed.*

Ramaprasada Rao and *Natarajan, JJ.*

M/s. Seth Nanak Chand Shadiram v. The Tinnevelly-Tuticorin Electric Supply Co., Ltd., Calcutta by power-of-attorney agent.

18th January, 1974.

A.S.No. 92 of 1968.

Civil Procedure Code (V of 1908), *sections* 20, 21—*Suit for recov ry of excess money paid—Supply of steel items—Contract—Provision in contract regarding forum to decide disputes—Suit laid in Court at Tuticorin—Defendant submitting to jurisdiction—Whether can raise objection to jurisdiction at appellate stage—Scope of section* 21—*Indian Contract Act (IX of* 1872), *section* 28.

Competency of a Court to try an action goes to the root of the matter and when such competence is not found, it has no jurisdiction at all to try the case. But objection based on jurisdiction is a matter which parties could waive and it was in that sense that if such jurisdiction was exercised by Courts, it did not go to the core of it so as to make the resultant judgment a nullity. Equally well-settled was the proposition that where there were two or more competent courts which could entertain a suit consequent upon a part of the cause of action having arisen within the jurisdiction of each of those courts, parties to the concerned transaction could contract to vest jurisdiction in one of such Courts to try disputes which might arise as between themselves. If such a contract was clear and explicit it was not hit by section 28 of the Contract Act. This is one of the many series of contracts available in mercantile practice and forged in the name of commercial expediency. In the instant case, the relevant portion of the contract read:

> "All dealings are subject to Madras jurisdiction".

The plaintiff was in the State of Madras. The defenant also was in the State of Madras. The plaintiff filed the suit before the subordinate Judge, Tuticorin. The suit was decreed for a certain sum and the defendant had come up on appeal. The defendant contended at the appellate stage that the parties had contracted specifically to vest jurisdiction to decide disputes in the courts at Madras and that the Court at Tuticorin had no jurisdiction to entertain the suit and much less to decide on it.

Held,

The second part of section 21 of the Civil Procedure Code laid down as a requirement in law that unless there had been a consequent failure of justice, a litigant should not be encouraged to raise the objection as to the place of suing at the appellate or revisional stage, since such objection, though taken in the Court of first instance, was not pressed to its normal end. In fact, the guidelines in section 21, Civil Procedure Code, made it imperative that such an objection had to be raised at the earliest opportunity and in all cases where issues were settled at or before such settlement.

Having regard to the express conduct of the appellant (defendant), and the fact that on merits he was unable to challenge the findings of the Court below and he was not prejudiced in the least by the trial of the case by the subordinate Judge, Tuticorin, the technical objection as to territorial jurisdiction could not be accepted and allowed at the appellate stage.

T. Raghavan and T. K. Seshadri, for Appellants.

M. R. Narayanaswami, for Respondent.

S.J. ——— *Appeal dismissed.*

Somasundaram, J.

Damodara Padayachi
v.
Louis Rajabather alias Antoine Rajabather.

21st January, 1974.

C.R.P. No. 970 of 1973

Transfer of Property Act (IV of 1822), *sections* 106, 117—*Eviction of agricultural tenant—User of land for non-agricultural purposes—Eviction ordered by revenuee Court—Plea of long user for non-agricultural purposes—Whether valid defence—Notice under section* 106 *of Transfer of Property Act—Whether necessary.*

In a petition by a landlord before the Revenue Court to evict the tenant for putting the land to use for non-agricultural purposes the tenant pleaded that he had been doing it for over 12 years. He also pleaded that the notice contemplated under section 106 of the Transfer of Property Act was not given and in the absence of such a notice, there could be no eviction.

Held, that there had been wrong user of land by the tenant and that was sufficient for sustaining the order of eviction.

Usage or local law generally governed agricultural tenancies and to such tenancies. Section 106 did not apply unless made applicable by notification under section 117. In other words notice under section 106 was not necessary in respect of agricultural leases unless it was made applicable by a specific notification under section 117. There was no such notification in this case. Further the lease deed said that no previous notice was necessary for terminating the lease.

V. Narayanaswami, Kurian, Arumugham and Joseph, for Appellants.

R. Gandhi, for Respondent.

S.J. ——— *Petition dismissed.*

Ramanujam, and *V. Ramaswami, JJ.*

Union of India *v.* Mrs. Sarojini Raja.

23rd January, 1974.

A.S.No. 818 of 1967.

Contract Act (IX of 1872), *section* 72—*Limitation Act (IX of* 1908), *section* 14, *Arts.* 96, 120—*Indian Income tax Act (XI of* 1922), *sections* 24-B, 26 (2)—*Suit for recovery of tax paid under mistake—Income-tax arrears of husband—Death of husband—Demand made on wife—Payment by wife—Allegation by wife that payment was made under mistaken impression that the demand related to her tax arrears—Suit for recovery—Section* 72 *of Contract Act applies—Plea of limitation raised by defendant—Validity—Suit not barred by provisions of the Income-tax Act.*

It is now well established that any payment made, whether voluntarily or otherwise, under a mistake either of law or of fact could be recovered once the mistake is established. Section 24-B of the Income-tax Act, 1922 makes the legal representative liable to pay to the extent to which the estate is capable of meeting the tax assessed on the deceased. Therefore, the liability of the deceased cannot be divorced from the estate of the deceased. The liability of the heirs of the deceased person is confined to the estate of the deceased in their hands and the revenue cannot resort to section 26 (2) of the Income-tax Act, 1922 and seek to recover the tax assessed on the legal representatives under that section by proceedings against their personal properties. The liability of the legal representatives has only to be determined with reference to section 24-B of the Income-tax Act, 1922.

In the instant case a person died on 30th November, 1959 and a notice of demand was served on his wife for a sum of Rs. 15,370-96 in December, 1959, in respect of the Income-tax arrears of the deceased. The wife paid the said sum within a few days in December, 1959. Subsequently, in January, 1960, she received another notice of demand for Rs. 10,487-47 in respect of her own assessment. The deceased's wife claimed that she paid the first sum of Rs. 15,370-96 under the mistaken impression that it pertained

to her own assessment and since on the date of payment of the arrears of her late husband she was not possessed of any of the assets of the deceased, the payment of Rs. 15,370.96 must be refunded to her. She invoked the provisions of section 72 of the Contract Act for this purpose and filed a suit on 29th June, 1963 for refund of the said amount. She also raised the plea that the payment was made under threat of coercion. The Union of India represented by the Income-tax Department pleaded in defence that there was no coercion, that the suit was barred by limitation and the suit was barred by section 67 of the Income-tax Act of 1922. It was held that the wife of the deceased was entitled to invoke section 72 of the Contract Act to seek recovery of the amount on the ground that she paid it though it was not legally due by her. Even if the suit in this case was treated as one based on coercion it should have been filed within three years from the date of payment. But the suit was filed beyond three years. Therefore section 14 of the Limitation Act could not be invoked for extending the period of limitation for filing the suit. The suit was barred by limitation.

So long as there was a statutory bar of limitation and the defendant raised such a plea which was available to him under the law, the Court could not ignore or reject the plea on the ground that the defendant being the government should not raise such a plea as against a citizen. On the question whether the suit was barred by section 67 of the Income-tax Act, 1922, *held*, that the suit was not barred by the provisions of the said Act. The Court was not concerned here with the statute imposing any liability and the liability being challenged.

V. Balasubramaniam and *J. Jayaraman*, for Appellant.

S. Swaminathan and *K. Ramagopal*, for Respondent.

S.J. ——— *Appeal allowed.*

Ramaprasada Rao and *Natarajan, JJ.*

Kandaswami Gounder *v.* Chinnamarimuthu Gounder.

30th October, 1973.

Appeal No. 625 of 1967.

Hindu Law—Joint family property—Alienations by father—Whether for legal necessity—Suit by minor coparceners—Allegation that debts were avyavaharika debts—Nature of evidence required.

To sustain a case by minor coparceners of a Hindu joint family irrespective of whether they were alive on the dates of the alienations or whether they were inducted into the family by birth later, that the debts incurred by their father were avyavaharika debts or tainted with immorality or illegality, it must be positively established that the father not only neglected the interests of the family, in particular the minor coparceners, but also that he was openly and publicly leading a wayward life. Such immoral living must be testified to by witnesses whose testimony had to be compellingly acceptable.

A mere statement in the witness-box by a witness called to aid by the plaintiffs must be treated with caution and rejected, if there was the least doubt entertained by the Court that the witness had merely come to the aid of the plaintiffs and was not speaking from his personal knowledge.

C. Chinnaswami and *R. Kulandaivelu*, for Appellant.

S.J. *Appeal dismissed.*

Ramanujam, J.

P. S. Sadasivaswamy *v.* State of Tamil Nadu.

16th November, 1973.

W.P. No. 3205 of 1971.

Tamil Nadu Highways Engineering Service, General Rules, rules 36 (b) (*i*), (*ii*), 48, *Special Rules, rule* 7, *Constitution of India* (1950), *Article* 226—*Promotion of Assistant Engineers as Divisional Engineers—Junior promoted on merits over senior—Senior aggrieved—Non-consideration of relative merits—alleged Arbitrary—Petitioner pursuing non-statutory remedies—Approaching Court after considerable delay—Court whether can ignore delay and grant relief—Category of Divisional Engineers—Selection grade—Promotion cannot be claimed as a matter of right—Rule* 48 *of General Rules—Exemption—Discretionary — Government's action under rule* 7 *of Special Rules—Valid.*

In November, 1956, the Chief Engineer, Highways and Rural Works of Tamil Nadu sent proposals to Government for the selection from Assistant Engineers fit for promotion as Divisional Engineers. *C*, an Assistant Engineer who had not put in six years as stipulated in rule 6 of General Rules of the Tamil Nadu Highways Engineering Service was selected because he was an overseas-scholar having a post-graduate degree in engineering and valuable research work to his credit. *S* who was senior to *C* was not considered for promotion as his service fell short of the requisite six years and he did not possess any special claims as *C* had. *S* made representations to Government and was later promoted as Divisional Engineer on 31st December, 1959. In 1971, *S* was also appointed as Superintending Engineer. Subsequently *S* filed a writ petition for the issue of a *mandamus* against the State of Tamil Nadu to restore his seniority as against *C* and others who were promoted earlier. On a consideration of the facts and circumstances,

Held,

The non-consideration of the relative merits and suitability of *S* and *C* in November, 1956 for promotion to the post of Divisional Engineer was somewhat arbitrary. Even then, it could not be

assumed at this stage that *S* would have been selected for promotion, if the relative assessment of merit and suitability had taken place. The list was prepared in November, 1956 and *S* in spite of representations to the Government on more than one occasion did not approach the Court for relief within a reasonable time. *C* had served as Divisional Engineer and also as Superintending Engineer and he had become senior in the category of Divisional Engineers and Superintending Engineers. Therefore, at this stage it was not possible for the Court to direct the Government to consider the relative merit and suitability as between the petitioner and *C* for promotion as Divisional Engineer.

The category of Divisional Engineers being a selection grade, merely because the petitioner had acquired the qualifying service subsequent to the date of the preparation of the panel, but before the date of appointment, he could not claim promotion as of right for the seniority would come in only when merit and ability were approximately equal. The contention of *S* would have merit only if the category of Divisional Engineers was not a selection grade.

Relaxation of a Rule by granting exemption under rule 48 of the General Rules conferred on the Government is a discretionary power and relaxation of this rule cannot be sought as a matter of right.

The promotion of *C* being on the basis of selection, the State of Tamil Nadu took into account the extra qualifications which *C* had for application of rule 7 of the Special Rule. *S* only claimed that by virtue of his seniority he should have been promoted under rule 7 of the Special Rules before *C*. Having regard to the considerations taken into account by the Chief Engineer and the State of Tamil Nadu while promoting *C* under rule 7 of the Special Rules, it could not be said his promotion was without regard to merit and ability.

Pursuing non-statutory remedies could not be adequate reason for invalidating the promotions of *C* and others only on the ground that *S* happened to be a senior in the cadre of Assistant Engineers.

Petitioner appearing in Person.

Assistant Government Pleader, for Respondent No. 1.

V. C. Palaniswami, for Respondent No. 2.

S. Srinivasan, for Respondents Nos. 3 and 4.

Respondent No. 5 not represented.

S.J. *Petition dismissed.*

Ramaprasada Rao and *Natarajan, JJ.*

K. E. M. Mohamed Ibrahim Marcan *v.* Perumal Padayachi.

23rd November, 1973.

Appeal No. 568 of 1967.

Interpretation of Documents—Agreement of sale of bus with route permit—Modus operandi *of transfer not mentioned in the document—Legal obligation apparent—Agreement cannot be avoided—Deed captioned as partnership—Intention only to be a working arrangement between parties—Document only formal and not a partnership deed.*

Merely because an express provision is not made in an agreement regarding the *modus operandi* for its implementation, the legal obligation of one of the parties which is quite apparent in the agreement cannot be avoided.

All stipulations and acts which arise from and out of a written contract between the parties have to be understood pragmatically and given effect to in accordance with law. Thus understood it is reasonable to expect that the parties should follow the procedure prescribed in law for achieving their object reflected in the said contract. If the parties either due to lethargy or with some design or purpose fail to adopt such a process to give effect to the object of the contract, the contract itself cannot for that reason become illegal or invalid.

On the question whether a deed captioned as partnership was in reality a partnership deed between the plaintiffs and the defendant,

Held,
that the deed was never intended to be acted upon to its logical end and there was intrinsic evidence, that it was only intended to project a working arrangement between the parties in order to protect the plaintiffs who were acting as financiers to the defendant for the conduct of his business. The deed was only a formal document executed by the parties as between themselves with no intention to follow the terms thereof or act upon it.

K. Yamunan, for Appellant.

K. Ramaswami and *Mrs. A. Sarojini Bai*, for Respondents.

S.J. *Appeal allowed.*

Ramaprasada Rao and *Natarajan, JJ.*

State of Madras *v.* Charles Harold Simpson.

10*th December*, 1973.

Appeal No. 21 of 197o.

Civil Procedure Code (V of 1908), *sections* 21, 10—*Judgment—Defect regarding pecuniary jurisdiction of Court—Objection technical—Scope on appeal—Judgment not a nullity*—Res judicata.

Any objection as to lack of jurisdiction both territorial and pecuniary is a technical one and the decision rendered is not open to consideration by an appellate Court, unless there has been prejudice on the merits.

Kiran Singh v. *Gaman Patwan*, A.I.R. 1954 S.C. 341, followed.

Any defect regarding the pecuniary jurisdiction of the Court is not so vital as to go to the very root of the subject-matter of the litigation rendering the ultimate judgment given a nullity.

A decision of the High Court which has become unchallengable in the sense that a further attempt by one of the parties to test its correctness in the Supreme Court was also unsuccessful binds that party and precludes it from reopening the question on the same or on similar ground.

The Additional Government Pleader, for Appellant.

S. Chellaswami, for Respondent.

S.J. *Appeal dismissed.*

Ismail, J.

M.P. Sanga Pillai *v.* The Krishnarayapuram Panchayat Union.

8*th January*, 1974.

W.P. No. 2992 of 1973.

Tamil Nadu Panchayat Act (XXXV of 1958), *section* 26 (d)—*"Subsisting contract"—Meaning of—Intention of the statute.*

The expression "subsisting contract" in section 26 (*d*) of the Tamil Nadu Panchayat Act has been used for the purpose of denoting a contract which has not yet been completed and a contract in which some obligations remain to be performed. The intention of the statute could not be, that while a person who entered into a contract with the panchayat after having become a member of the panchayat would not be disqualified, a person who acquired an interest in a contract which had already come into existence would become disqualified.

K. Parasaran, for Petitioner.

K. Alagriswami, for 1st Respondent.

E. Padmanabhan, for 3rd Respondent.

S.J. *Petition dismissed.*

K. Veeraswami, C. J. and
Varadarajan, J.

The Settlement Officer, Salem *v.* K. V. Krishna Iyer.

10*th January,* 1974.

W.A. No. 98 of 1971.

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), *sections* 11, 67—*Limitation Act (XXXVI of* 1963), *section* 5—*Grant of patta—Order of Assistant Settlement Officer—Revision therefrom—Delay in filing—Power to condone—Whether available to the Settlement Officer or the Director of Settlements—Application of section* 5 *of Limitation Act expressly excluded—Delay cannot be condoned.*

In respect of a revision from an order of the Assistant Settlement Officer granting patta under section 11 of Madras Act (XXVI of 1948), there is no power in the Settlement Officer or the Director of Settlements to condone a delay in filing the revision petition.

The application of section 5 of the Limitation Act, has been expressly excluded by a specific rule which requires the filing of a revision petition to the Settlement Officer or to the Director within a specified time. That means, neither the Settlement Officer nor the Director of Settlements has the power to condone the delay under section 5 of the Limitation Act.

Government Pleader, for Appellants.

S. Jagadisan, for Respondents.

S.J. *Appeal dismissed.*

K. Veeraswami, C.J. and
Varadarajan, J.,

S. P. Munuswamy Gounder *v.* Erusa Gounder *alias* S.F.C. Dorai.

22*nd January,* 1974.

L.P.A. No. 75 of 1966.

Transfer of Property Act (IV of 1882), *section* 53-A—*Suit for declaration of title—Agreement to sell—Purchaser put in possession of properties in part performance—Subsequent sale by vendor to other purchasers—Trespass by subsequent purchasers—Trial Court granting prayer—First appellate Court discharging the finding by Trial Court—Second Appeal—Trial Court's decree restored—Letters Patent Appeal—Scope of section* 53-*A of Transfer of Property Act—Matter remitted to First Appellate Court with directions.*

Section 53-A of the Transfer of Property Act does confer some right on the transferee, if the conditions of that section were fully satisfied and what that right was was also clear from the provisions of section 53-A. The right was to have the transferor or any person claiming under him debarred from enforcing against the transferee and persons claiming under him anything in respect of the property of which the transferee had taken or continued in possession. That right could be used by the transferee always as a shield and not as an independent claim either in the capacity of plaintiff or defendant, that is to say, he could not ask for title basing his claim on the fact that he had fulfilled the conditions of section 53-A. But he could, as a shield, ask for protection of the right envisaged by section 53-A by debarring, in other words, by getting an injunction against the transferor and those claiming under him from interfering with his possession.

In the instant case the plaintiff claimed that pursuant to a contract for sale, the first defendant put the plaintiff in possession of the suit properties. At that time the plaintiff was a minor and the agreement was entered with the guardian. Subsequently Defendants 2 to 4 obtained a sale and attempted to trespass. Plaintiff filed a suit for declaration of title and for an injunction from interference. The trial Court found that there was an agreement for sale, that the plaintiff was put

in possession and, on that basis, granted the prayers. The first appellate Court proceeded upon the view that section 53-A of the Transfer of Property Act by itself did not confer title on the plaintiff and therefore he could not rest the claim for title on the basis of part-performance. As to possession, it held that the finding of the trial Court was unnecessary and discharged the finding. On second appeal, the trial Court's decree was restored. The defendants filed a Letters Patent Appeal.

Held; the proper course for the Judge sitting in second appeal was to remit the matter to the first appellate Court to find whether the trial Court's finding as to possession was justified and well founded. The learned Judge also should have satisfied himself, before restoring the first Court's judgment, that the conditions of section 53-A had been fully satisfied. The appeal was directed to be restored to the file of the first appellate Court and disposed of in the light of this judgment. (directions given.)

R. Shanmugham, for Appellants.

S.J. ——— *Appeal allowed.*

N.S. Ramaswami, J.

P. Gurusamy Thevar *v.* Rengasami Naicker.

22nd January, 1974.

C.R.P.Nos. 2679, 2680 and 2681 of 1973.

Civil Procedure Code (*V of* 1908), *Order* 21, *rules* 84, 85 *and* 86—*Execution—Court auction—Sale—Deposit of general stamps not proper—Deficiency—Application for excusing delay for deposit of deficient stamps —Allowed by executing Court—Whether proper—Order without jurisdiction—Rules* 85 *and* 86—*Mandatory.*

In auction by the Court in three lots, there were purchasers who were third parties. The respective purchasers deposited the 25 per cent of the purchase money in accordance with Order 21, rule 84, Civil Procedure Code. The balance of money was also deposited within fifteen days period as per rule 85 of of Order 21. But, in each of the three cases, the deposit of general stamps was not proper and was deficient. Eight days after the fifteen days period prescribed in rule 85 the respective purchasers deposited the deficient stamps and also filed applications for excusing delay. The executing Court allowed the applications. The order of the executing Court was challenged.

Held: The auction purchasers were third parties and the proviso to rule 85 of Order 21, had no application at all. In the present case, there was no question of any period being fixed or granted by the Court for the doing of a particular act. It was the statutory provision contained in rule 85 of Order 21, which made it obligatory on the part of the auction purchaser to deposit not only the full amount of purchase money but also the general stamps within the prescribed period, namely, fifteen days from the date of sale. There was no provision in the Code which authorised the executing Court to extend the abovesaid period of fifteen days. On the contrary, rule 86 made it clear that if there was any default in payment within the period prescribed in rule 85, the property shall be resold and the purchaser should forfeit all claims to the property. Undoubtedly rules 85 and 86 were mandatory. The Court had no discretion in the matter. Of course, under rule 86, the executing Court was given discretion but that discretion related only to the question whether the deposit already made (under rule 84) had to be forfeited or not. In the face of the decision in *M.M. Shah* v. *Sayed Mohamad*, (1954) 2 M.L.J. 55 (S.C.) of the Supreme Court, the executing Court was entirely in the wrong in allowing the applications filed by the auction purchasers. There was no provision in the Code for such extension of time. The provisions rules 84, 85 and 86 of Order 21 of the Code are mandatory and the Court had no jurisdiction to extend time.

K. Venkataswami; for Petitioners.

E. Padmanabhan, for 1st Respondent.

K. Ramamurthy, for 2nd Respondent in all Petitions.

S.J. ——— *Petitions allowed.*

Ramaprasada Rao and
Natarajan, JJ.

Veeraswami Mandiri *v.* Kuppuswami.

7th February, 1974.

A.S. No. 847 of 1967.

Hindu law—Joint family—Suit for partition—Suit properties whether family properties—Properties in the name of coparcener—Whether separate—Burden of proof—Coparcener setting up title to prove—Family character of property—Property may stand in the name of manager.

It is possible for a coparcener in a joint Hindu family to secure and obtain properties from and out of his own independent income such as gains of learning, business, etc. But this general proposition cannot be stretched too far and when a dispute arises whether such properties were purchased from a source other than the nucleus of ancestral properties or their income, then the burden is on the said coparcener, who sets up an independent title in himself over such properties, to establish that the source of purchase money was different from the ancestral properties or the income therefrom.

The manager may under certain circumstances acquire properties in his name, but intended for the benefit of the joint family. To prove that a particular item of property is not a joint family property but the absolute property of one of the coparceners it is necessary that such person, who sets up title in him or through his ancestor, should establish beyond reasonable doubt by cogent evidence that the property was treated by the family as the independent property of the coparcener and was never brought into the hotchpot at any time and accepted as partible property.

K. Sarvabhauman and *T.R. Mani,* for Appellants.

T.R. Ramachandran and *T. R. Rajagopalan,* for Respondents.

S.J. ——— *Appeal dismissed.*

Ramanujam and
V. Ramaswami, JJ.

M/s. Killick Nixon Ltd. *v.* V. R. Narayana Rao

12th February, 1974.

A.S. No. 518 of 1973.

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 30—*Suit for ejectment and possession—Suit premises godown—Suit decreed — Amending Act XXIII of* 1973 *coming into force pending proceedings—Amendment of section* 30 *of principal Act—Suit premises falling within Amendment—Effect—Amendment prospective and not retrospective—Validity of decree different from its executability.*

The amending Act (Madras Act XXIII of 1973) did not indicate as to what was to happen to the decisions of civil Courts rendered prior to the amendment of section 30 of Madras Buildings (Lease and Rent Control) Act XVIII of 1960. Therefore, the amending Act could not be taken to affect pending proceedings or the decisions rendered therein. If the legislature intended the amendment to be retrospective so as to affect vested rights it would have made a specific provision for abatement of the pending proceedings and the decisions rendered therein as was done when the amending Act (II of 1962) was passed. It cannot be held that Act XIII of 1973 either expressly or by necessary implication has provided for abatement of pending proceedings. In the absence of any such provision, it has to be taken that the amending Act was only prospective.

The validity of a decree is one thing and its executability is another and the Court while passing a decree is not concerned with its executability.

Devadasan and *Sagar,* for Appellants.

T.R. Mani and *S. Gopalaratnam,* for Respondents.

S.J. ——— *Appeal dismissed.*

Ismail, J.

P. M. Raval v. K. G. Ramachandran.

14th February, 1974.

W.P.No. 677 of 1971.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 4—*The Madras Buildings (Lease and Rent Control) Rules*, 1961, *rules* 12, 14—*Non-residential building—Petition for fixation of fair rent—"Cost of construction"—Meaning of—"As calculated according to such rates for such classes of non-residential buildings as may be prescribed" occurring in section* 4 (3) (b) (*i*)—*Surplus and* otiose—*Rules* 12 *and* 14 *inter connected —Rule* 12 *held void by Supreme Court — Consequently rule* 14 *cannot stand independently—Fair rent contemplated by statute—Cannot be arrived at*

The expression, "as calculated according to such rates for such classes of non-residential buildings as may be prescribed" occurring in sub-section (3) (*b*) (*i*) of section 4 of Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, must be deemed to be surplus or *otiose*. The expession, "cost of construction" itself means only the original cost of construction. Once the expression, "cost of construction" denoted the original cost of construction, the expression following that in sub-section (3) (*b*) (i), as extracted above, will be meaningless and therefore it cannot be contended that there being no prescription of the rates, the cost of construction cannot be arrived at.

Once the Supreme Court has held in *K. C. Nambiar* v. *IVth Judge of Court of Small Causes*, (1970) 1 S.C.R. 906: (1970) 2 S.C.J. 23: (1970) 2 M.L.J. (S.C.) 24: (1970) 2 An.W.R. (S.C.) 24: A.I.R. 1970 S.C. 1656, that rule 12 is void as being *ultra vires* and going beyond the terms of the section, rule 14 also will have to go, for the simple reason that rule 12 as well as rule 14 form an integral part of a single and definite scheme, that scheme being to find out the present cost of reproducing the building and from that value deducting the depreciation backwards for the purpose of arriving at the cost of construction. Once rule 12 is held to be void, rule 14 cannot have an independent existence, because rule 14 is intended to operate on the figure arrived at by the application of rule 12. In other words, rule 14 is inextricably bound up with rule 12 and once rule 12 falls rule 14 cannot stand independently and cannot be worked.

Since the scheme of the rules framed by the Government contemplated deducting depreciation backwards on the basis of the validity of rule 12, and since that rule is held to be void, rule 14 cannot be applied. This is apparent even from the terms of Schedule II itself, which is referred to in rule 14.

Once rules 12 and 14 are out of the way, the statute does not prescribe any other method of arriving at the cost of construction contemplated by sub-section 3 (*b*) (*i*) of section 4. Once the total cost of a non-residential building cannot be arrived at as contemplated by sub-section 3 (*b*) (i) of section 4, sub-section 3 (*a*) itself cannot be applied and the fair rent cannot be arrived at as contemplated by the statute.

V.K.T. Chari for *K.C. Jacob* and *S.K.L. Ratan*, for Petitioners.

S. Ramolingam, Assistant Government Pleader, for 5th Respondent.

A.N. Rangaswami for Respondents 1 to 3

S.J. ——— *Petitions allowed.*

Maharajan, J.

Chinnakkannu Nadar v. Chellappa Nadar.

4th March, 1974

C.M.S.A. No. 3 of 1973.

Civil Procedure Code (V of 1908), *Order* 21, *rule* 90—*Court sale—Application to set aside —Material irregularity—Allegation of non-service of sale proclamation on judgment-debtor—Process-server alleging refusal to accept service whether correct—Sale—Whether valid.*

The judgment-debtor filed an application under Order 21, rule 90, Civil Procedure Code, on the ground that there had been material irregularity and fraud in the publication and conduct of the sale. His objections were overruled. Then the sons of the judgment-debtor preferred a claim and that was dismissed. The endorsement of the process server was that the judgment-debtor refused to receive the notice of sale. The attes-

tor to the endorsement of the process-server said that he did not sign the endorsement and that he was not present at the time of when the judgment-debtor allegedly refused to receive the notice. On the question of the validity of the sale,

Held, that the conduct of the judgment-debtor in engaging Counsel and filing objections at an earlier stage in the execution proceedings and the conduct of the judgment-debtor's sons in preferring a claim, which proved a abortive would render probable the case of the process-server that, when he tookout notice to the judgment-debtor, he refused to receive the same. It must, therefore, he held that there had been no fraud or irregularity in the publication of sale and that the sale had taken place with the knowledge of the judgment-debtor.

P. Ananthakrishnan Nair, for Appellant.

S. Padmanabhan, for Respondents.

S.J. ——— *Appeal dismissed.*

Ismail, J.

John Bos Co. v. The President, Madras Dock Labour Board, Madras-1.

6th March, 1974.

W.P. No. 3047 of 1971.

Constitution of India, (1950) Article 311 (2)—Standing Order of Dock Labour Board—Employee of Dock Labour Board—Ledger clerk—Charge of misappropriation of funds—Enquiry and dismissal—Not allowed assistance of a lawyer at enquiry—Whether violation of constitutional right.

The petitioner was a ledger clerk in the Accounts Department of the Madras Dock Labour Board. A charge was framed against him that he misappropriated the funds of the Board and an enquiry was conducted for the purpose. Ultimately the petitioner was dismissed from service. The petitioner challenged the validity of this order of dismissal and one of the contentions raised was that he was denied an opp rtunity of having the assistance of a lawyer in the enquiry and that violated Article 311 (2) of the Constitution of India.

Held, that the petitioner was not a Government servant and therefore Article 311 of the Constitution did not apply to him. According to the Standing Orders applicable to the staff of the Madras Dock Labour Board, the petitioner was entitled to have the assistance of a co-employee only and that assistance was made available to him, but he did not avail that opportunity and insisted on having a retired employee as his helper or a lawyer. There was, therefore, no violation of any constitutional right.

Mrs. Leelie Seetharaman, for Petitioner.

B. R. Dolia, for Respondent.

S. J. ——— *Petition dismissed.*

Ismail, J.

The Management of Crompton Engineering Co., (Madras) Private Ltd. *v.* The Presiding Officer, Addl. Labour Court, Madras.

21st February, 1974.

W.P.No. 2558 of 1971.

Industrial Disputes Act (XIV of 1947), *section* 2 (s)—*Casual labourers—Appointment for a specific period—Particular work—Work over—Employment coming to an end automatically—Workman whether can claim reinstatement—Order of reinstatement not valid.*

Solely because the definition of the term 'workman' in section 2 (*s*) of the Industrial Disputes Act included temporary or casual labourers also, it did not follow that such temporary or casual labourers were entitled to reinstatement.

In the instant case, Respondents 2 to 4 were appointed only for a specific period or for a particular work and as soon as the period was over or the work was over, their employment automatically came to an end. There was no rule or law which contemplated that such an employee should be given work again by the employer.

Essentially, an order of reinstatement postulated the existence of a post in which the particular person was working and with reference to which his employment was terminated. When there was no post and there was no termination of employment there was no question of reinstatement.

Even though respondents 2 to 4, would come within the scope of the term '*workman*' in section 2 (*s*) of the Industrial Disputes Act, they would not be entitled to reinstatement as ordered by the Labour Court since there was no question of termination of their services or discharge of the workmen concerned as their employment itself was for a particular period or for a particular job and such employment came to an end automatically as soon as the term was over or the job was over.

M.R. Narayanaswamy for Petitioner.

S. Ramalingam, Assistant Government Pleader for Respondent No. 1.

P.K. Gopalraj, for Respondents 2 to 4.

S.J. ——— *Petition allowed.*

Kailasam, and
Maharajan, JJ.

G. Annoussamy *v.* The State of Pondicherry.

13th March, 1974.

L.P.A.No. 10 of 1970.

Government Servant—Government of Pondicherry—French Law—Government servant taking part in politics—Issue of arrete *by Government—Disciplinary proceedings against the Government servant—Termination of the services—Validity*—le violation de la loi—le de le detournement de pouvoir.

Under the French law, before taking any disciplinary proceeding against any Government servant, civil or military, it is incumbent upon the administration to communicate to the official a *dossier* containing the charge and all the documents in proof of the charge. In the instant case no notice was served on the Government servant, nor was a hearing given to him before his services were terminated. The *Counseil d'Etat* would have certainly struck down the act of the administration on the ground that it did not answer the test of external legality and that the preliminary procedure that ought to have been followed before taking action against the Government servant had not been followed. In French law, such an irregularity was regarded as *vice de forme*, that is to say, defect in form.

Though the *arrete* of 1937 provided that a probationary teacher's services could be terminated, if he failed to get the prescribed certificate within the time prescribed for it, it could only operate upon the probationary teachers appointed on or after the date of the *arrete*, and not upon those who had been appointed under the earlier *arrete* which prescribed no such penalty. By purporting to terminate the services of the Government servant in exercise of the powers conferred on the administration under the *arrete* of 1937, the administration overlooked the fact that it had no power to do so as the Government servant had acquired a vested interest under the anterior *arrete* which was in force at the time of his appointment. The act of the administration in dismissing

the Government servant was, therefore, clearly the result of *le violation de la loi* (violation of law).

The excuse trotted out in the order of termination could scarcely conceal the undoubted motive of the administration, *viz.*, to liquidate a political opponent, who in his passion for freedom, which his stay in France had generated, had the temerity to challenge the imperialistic notions of the Governor. It was, therefore clear that the purpose of the *arrete* of 1937 was used against the Government servant was totally extraneous to the purpose for which it had been issued. It followed that the impugned order was a clear illustration of *le detournement de pouvoir* (exceeding the power).

N.T. Vanamamalai and *R. Ganesan* for Appellant.

C. Krishnan, Government Pleader for Respondent.

S.J. ——— *Appeal allowed.*

Varadarajan, J.

The Management of Sayani Talkies *v.* K. A. Ramamurthi.

15th March, 1974.

A A.O.No. 52 of 1972.

Arbitration Act (X of 1940), *section* 14 (2), —*Industrial Disputes Act (XIV of* 1947) *section* 12 (3)—*Dispute between employer and employee—Referred to arbitrator—Award of arbitrator—Employee's entitlement to reinstatement etc.—Petition under section* 30 *of the Arbitration Act by employer — Validity —Powers of Civil Court.*

There can be no doubt that the civil Court has no jurisdiction to enforce a contract of personal service and it could award only damages for breach of any such contract. The decision in *U.P.S.W. Corporation, Lucknow* v. *C.K. Tyagi* (A.I.R. 1970 S.C. 1244) does not lay down that it is not open to an arbitrator appointed under section 12 (3) of the Industrial Disputes Act, to pass an award directing reinstatement of an employee even though the reference made to him was to consider whether the non-employment of that employee was justified.

It would appear from the decision in *Alopi Parshad & Sons* v. *Union of India*, (1960) 2 An.W.R. (S.C.) 46, that the civil Court is bound to pass a decree in terms of the award filed into Court under section 14 (2) of the Arbitration Act, if the award is not vitiated by any of the grounds mentioned in section 30 of the Arbitration Act.

In the instant case, it was held that the arbitrator was entitled to pass an award for reinstatement and if that award was not set aside for any of the reasons mentioned in section 30 of the Arbitration Act, after it was filed into Court, a decree in terms of the award had to follow.

King and *Patridge* for Appellant.

V. Krishnan for 2nd Respondent.

The Additional Government Pleader for 1st Respondent.

S.J. ——— *Appeal dismissed.*

N. S. Ramaswami, J.

Pavayammal *v.* Chellappa Gounder.

C.R.P. No. 2706 of 1973.

6th February, 1974.

Civil Procedure Code (V of 1908), Order 9, rule 9, Order 17, rules 2, 3—Dismissal of suit —Plaintiffs present—Counsel absent—Request for adjournment—Adjournment refused—Suit dismissed—Applications under Order 9, rule 9 for restoration—Dismissal whether under Order 17, rule 2, or rule 3—Judicial precedent of High Court—Failure to follow by subordinate Court—Would amount to insubordination.

The plaintiffs in three suits were present when the suits were taken up, but their Counsel was absent. The plaintiffs represented to the Court that without their Counsel they could not prosecute the suits. The Court refused to adjourn the suits and dismissed the same. The plaintiffs filed applications under Order 9, rule 9, Civil Procedure Code for restoring the suits to file. On the question whether the dismissal was under Order 17, rule 3 or rule 2,

Held,

Where a party was represented by Counsel, but the Counsel did not appear and the party did not take part in the proceedings, the party could not be said to have " appeared". It was also clear that merely asking for an adjournment was not taking part in the proceedings.

The view that in the three suits the plaintiffs did not " appear " on the date of hearing and that the dismissal of the three suits was only under Order 17, rule 2, Civil Procedure Code was correct.

In the instant case, the decision in *Natesa Thevar* v. *Vairavan Servaigaran*, A.I.R. 1955 Mad. 258 was cited and the decision was on all fours with the present case. However, the learned District Munsif did not say that the decision did not square with the cases before him. But he said that the Rajasthan High Court had taken a different view on the point in question and that he would agree with the Rajasthan High Court. On the question of judicial precedents,

Held :

Failure to follow a judicial precedent of the High Court to which the Court was subordinate, would amount to dereliction of duty if not insubordination. In the instant case, this was clear insubordination. All the High Courts have uniformly held that if there was a decision of the High Court to which the Court dealing with the matter was subordinate, which decision was applicable to the facts of the case on hand, the subordinate Court was bound to follow that decision in preference to the decision of any other High Court taking a contrary view.

R. Shanmugham, for Petitioner.

T. Somasundaram, for 1st Respondent.

S.J. *Petition dismissed.*

Gokulakrishnan, J.

Esakki Doss *v.* Rakisathammal.

A.A.O. No. 65 of 1973.

8th February, 1974.

Civil Procedure Code (V of 1908), section 47, Order 21, rule 66—Court sale—Application to set aside —Judgment debtor's valuation not given in the sale proclamation—Sale proclamation defective —Sale liable to be set aside.

A sale proclamation must contain all the particulars mentioned in Order 21, rule 66 (2), Civil Procedure Code and must be settled and written by the Judge and signed by him. That is the " Proclamation " which has to be taken as settled by the Court. If that "proclamation " does not contain the necessary particulars, it has to be held that there is defect in the proclamation of sale itself. In the instant case, the notes paper, wherein the District Munsif had stated certain particulars and signed on 31st August, 1966 could be taken as the "proclamation " settled by the Court as provided under Order 21, rule 66, Civil Procedure Code. This proclamation however admittedly did not contain the judgment-debtor's valuation. On the question of the validity of the proclamation,

Held,

There was a clear defect in the proclamation of sale which vitiated the entire sale proceedings. As such, the matter squarely came under section 47, Civil Procedure Code and the sale held on such defective "proclamation" settled by the Court is liable to be set aside.

M. Srinivasan, for the Appellant.

P. Venkataraman, for the 1st Respondent.

S.J. *Appeal dismissed.*

K. Veeraswami, C.J. and
Varadarajan, J.

Papanasam Fishermen Co-operative Society Ltd., Papanasam Taluk, Thanjavur District and another
v.
The Collector of Thanjavur.

W.A. Nos. 339 and 340 of 1973.
28th February, 1974.

Tamil Nadu Inland Fisheries (Lease and Licence) Rules, (1972), *rule* 2, *Proviso—Constitution of India* (1950), *Article* 226*—Licence for fishing rights—Grant by Collector—Interference by Government—Direction to cancel the lease already granted—Show cause notice—*Explanation *rejected—Principles of natural justice—Whether satisfied—Proviso to rule* 2 *—Effect of—Statutory power—Need not be mentioned when exercised.*

Once it is shown that the statutory power exists, the non-mention of it on the occation of its exercise would not derogate from the fact that the authority acted in exercise of such statutory power.

The effect of the proviso to rule 2 of the Tamil Nadu Inland Fisheries (Lease and Licence) Rules, 1972, was that it took out of the scope of the rule a case of Departmental fishing or fishing by the Department itself.

In the instant case, a co-operative society was granted a lease for fishing rights. Subsequently the Government directed the Collector to stay the grant and followed it up by further directions to cancel the lease and grant the same to another society. The Collector followed the directions and issued a show cause notice and after the society submitted an explanation cancelled the lease merely stating that the explanation was not satisfactory. Against the cancellation, the society filed a petition to quash the orders of the Collector. This was dismissed. On further appeal,

Held,

The Collector's order merely said that the elaborate explanation of the appellant was unsatisfactory. It was obvious that that was not compliance with the requirements of the principles of natural justice. The compliance should be a substantial one, that is to say, it should be not merely in form ; the opportunity must be complete, reasonable and adequate which meant also that when an explanation was submitted by the person who was asked to show cause, the authority concerned should apply its mind to the explanation and not merely say it was unsatisfactory. Also, the orders of the Collector were subject to review by the Court under Article 226 of the Constitution, and the non-speaking order of the Collector did not show its reasonableness or compliance with the principles of natural justice.

The direction of the Government to the Collector to cancel the lease was obviously irregular and the Government ought not to have issued such instructions to the Collector.

K. K. Venugopal, N. Ganapathy and *V. M. Jayapandian,* for Appellants.

The Government Pleader, *V. P. Raman* and *B. Kumar,* for Respondents.

S.J. *Appeals allowed.*